limits provision and to rely on existing sources for information regarding system ownership. We disagree, however, with the Commission's further suggestion that, at the time of a transfer or assignment, operators be required to certify either to local authorities or to the Commission that they are in compliance with the subscriber limits provision. As the Commission notes, at the subscriber limits level it is considering (which is lower than the level we believe should be adopted), it is likely that no operator will face an immediate risk of non-compliance. Given this fact, the vast majority of transfer and assignments will never implicate the subscriber limits and, thus, there is no reason to subject operators to the unnecessary burden of a new certification requirement.[49]

NCTA believes that the best approach is for the Commission to monitor and enforce the subscriber limits on its own initiative, relying on publicly available information. This approach minimizes the burdens that would otherwise be imposed on cable operators, local officials, and the Commission by either a reporting requirement or a certification procedure. Moreover, it ensures that the limits will be applied uniformly and is consistent with the establishment of subscriber limits as a

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[49]As another alternative, the Commission suggests the use of a complaint process. As a practical matter, a complaint procedure probably would be at least as burdensome (if not more so) than either a reporting requirement or a certification process.

structural safeguard rather than as a remedy for particular incidents of allegedly anticompetitive behavior.[50]

6. Periodic Review

Lastly, the Commission proposes to revisit the subscriber limits every five years to determine whether the limits are reasonable under prevailing market conditions.[51] As NCTA has indicated throughout these comments, the subscriber limits provision should serve primarily as a stopgap against any major transformation in market structure. Therefore, NCTA believes that a five-year review schedule is appropriate. A more abbreviated schedule seems unnecessary in light of the statutory purposes.

C. Section 613(f)(1)(B): Channel Occupancy Limits

Section 613(f)(1)(B) of the Act requires the Commission to adopt "reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[52] In addition to seeking comment on what constitutes a "reasonable" channel occupancy limit, the Commission's NPRM raises issues relating to

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[50]Because subscriber limits should operate primarily as a means of preventing precipitous changes in the marketplace, it is both necessary and appropriate for the Commission to consider and grant waiver requests where the public interest would thereby be served. We urge the Commission to signal its willingness to consider waivers, particularly where the extent to which an operator exceeds the subscriber limits is de minimis or where an operator exceeds the limit by expanding service into a previously unserved rural area.

[51]NPRM at ¶40.

[52]47 U.S.C. §533(f)(1)(B).

the appropriate attribution standard for purposes of this provision; whether broadcast, PEG, and leased access channels should be included in computing the channel occupancy limits; whether the channel occupancy limits should apply only to video programmers affiliated with the particular cable operator or whether such limits should apply to any affiliated programmer; the effect of emerging technologies; whether the limits should be phased out in communities where "effective competition" exists; and how the limits should be enforced.

Before turning to these specific issues, NCTA believes that it is appropriate to offer several general observations about channel occupancy limits and how the Commission should approach this provision.

First, limiting the number of channels that can be occupied on a cable system by a programmer that is affiliated with that system raises serious constitutional concerns. Whether viewed separately, or jointly with other provisions that restrict a cable operator's use of its channels of communication, the imposition of channel occupancy limits seriously impairs the exercise of a cable operator's first amendment rights both as a speaker (through its affiliated cable programmer) and as an editor (in determining how its channels are utilized). In the face of these constitutional concerns, it is imperative that the Commission exercise great caution in establishing channel occupancy limits.

Second, the imposition of channel occupancy limits raises practical concerns as well. Such limits not only may stigmatize a particular class of programmers -- those integrated with cable operators -- but also may lead to irrational distinctions among cable subscribers. For example, if the channel occupancy limits are set too low, subscribers served by a particular operator may be denied access to attractive new programming services that are provided to neighboring communities served by different cable operators. Restricting the flow of programming to subscribers in this way is directly at odds with one of the principal purposes of Section 613(f).

Finally, assuming that vertical integration will result in a diminution in the diversity of program voices available to subscribers is completely unwarranted. As discussed in Section IA, vertical integration promotes, rather than impedes, program diversity. Certainly, no subscriber considering whether to watch CNN, BET, the Cartoon Network, the Family Channel, Discovery, or the QVC Network, all of which arguably have some shared ownership, could reasonably conclude that he or she is not being offered a diverse array of choices. Thus, if channel occupancy limits are set at a level that impedes investment in new and existing services, the likely outcome will be <u>less</u> diversity, not more.

1. <u>Establishing A Reasonable Channel Occupancy Limit</u>

In the NPRM, the Commission has tentatively concluded that channel occupancy limits should be set as a percentage of a cable

system's channels.[53] The Commission asks for comment on the designation of a specific percentage limit that will prevent competitive abuses without discouraging investment relationships between cable operators and programmers.[54] The Commission also asks for comment on the relationship between the establishment of a particular channel occupancy limit and other provisions in the 1992 Act (such as program access, regulation of carriage agreements, leased access, and must-carry) fashioned by Congress to curb the adverse effects of vertical integration and promoting diversity.[55]

In response to these questions, NCTA notes first that there is considerable uncertainty surrounding the channel occupancy provision: how should it be calculated, what should the attribution criteria be, to whom should it apply. Until these issues are resolved, it is extremely difficult to assess the impact of any particular limit. In fact, given the uncertainty surrounding so many important aspects of the channel occupancy limits, NCTA suggests that the Commission should consider addressing the designation of a specific limit in a separate proceeding subsequent to the resolution of these other issues.

While NCTA is understandably reluctant to discuss any specific channel occupancy limit at this time, we would note that the 20% figure referenced in the legislative history was merely

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[53]NPRM at ¶52.

[54]Id.

[55]Id.

an example and, in our view, is far below what would constitute a reasonable limit. Indeed, notwithstanding the difficulty in assessing specific proposals for a channel occupancy limit, the one thing that is clear is that the limit must be set at a fairly high level so as not to deter continued beneficial investment in cable networks by cable operators.

In this regard, the Commission's inquiry regarding the significance of various other provisions of the Act to the establishment of a channel occupancy limit is well-taken. As we have repeatedly emphasized, Congress has signaled its intent to address particular allegations of abuse or restrictions on diversity through provisions of the Act dealing with leased access, regulation of carriage agreements, must-carry, and program access. In light of these provisions, it would be unwarranted for the Commission to establish a channel occupancy limit under Section 613(f) that is so low that it will transform the existing market structure of the cable industry.[56] Furthermore, the relationship between the channel occupancy limits provision and the program access provision merits special concern. It is difficult to conceive of a greater deterrent to the continued investment by cable operators in programming networks than the creation of a situation in which the channel occupancy limits and the program access provision operate to

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[56]In addition, as indicated above, whether a particular channel occupancy limit is reasonable, either as a constitutional matter or from a practical standpoint, may be affected significantly by the way in which these other provisions are implemented.

force a cable operator to sell programming in which it has invested to a competing distributor while simultaneously preventing the operator from offering such programming on its own system.

2. Attribution Limits

Noting that the term "attributable interest" is not defined in the 1992 Act, the Commission asks for comment on what attribution standard should be used in applying the channel occupancy limits.[57] As was the case with respect to the subscriber limits provision, the legislative history suggests that the Commission utilize the broadcast attribution criteria "or such other criteria as the Commission may deem appropriate."[58]

NCTA submits that application of the broadcast attribution criteria would be inappropriate in the context of the channel occupancy provision and that, as we proposed with respect to the subscriber limits provision, the Commission should adopt an attribution standard based on actual voting or working control.

First, a mere 5% ownership interest, as specified in the broadcast attribution rules, does not give an investor either the

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[57]NPRM at ¶46.

[58]Id., citing Senate Report at 80.

opportunity or the incentive to restrict the availability of a network to competing distributors. Nor, in a multichannel environment, does it give a non-controlling investor the opportunity to impose a particular viewpoint on a program service. The principal reason cable operators make minority investments in a program network is not to gain control over that network's business decisions and content, but to spread the risk inherent in such ventures.[59]

Second, as indicated above, the application of a low attribution standard will absolutely destroy the incentives for cable operator investment in program networks, particularly when applied in conjunction with the program access rule. Together, these provisions could cause operators to lose the ability to carry on their own systems networks in which they have invested and which must be sold to competing distributors. Given that programmers frequently encourage non-controlling cable operator investment in their services as a way of creating an incentive for carriage, a low attribution level could deter rather than promote the flow of programming to the public.

3. The Status Of Broadcast, PEG And Leased Access Channels

Citing the Act's legislative history, the Commission asks whether the channel occupancy limits should be based on all

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[59]C-SPAN presents a good example of the risk posed by the adoption of an unduly low attribution standard. While approximately 95% of the funding for C-SPAN comes from cable operators, those operators have no control over C-SPAN's programming.

activated channels, or whether broadcast, PEG, and leased access channels should be deducted from the calculation.[60] NCTA submits that deducting such channels is neither required by the legislative history nor warranted as a matter of policy.

While the Senate Report does provide an "example" of a channel occupancy calculation in which broadcast, PEG, and leased access channels are subtracted from the total number of activated channels, that example is in no way binding on the Commission. The legislative history of Section 613(f) clearly indicates that Congress intended for the Commission to have considerable discretion and flexibility in establishing limits on horizontal and vertical concentration.[61]

Moreover, as a matter of policy, excluding broadcast, PEG, and leased access from the channel occupancy calculation makes no sense. One of Congress' primary concerns about vertical integration is its potential adverse impact on diversity. The carriage of unaffiliated broadcast, PEG, and leased access channels serves the interest of diversity. In addition, reducing the base on which the channel occupancy calculation is made will have the effect of reducing the number of channels on which an operator is permitted to carry integrated program networks. This not only will exacerbate the constitutional concerns raised by the imposition of channel occupancy limits, but also will deter operators from investing in new, untried services since they will

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[60]NPRM at ¶47, citing Senate Report at 80.

[61]Senate Report at 80. See also id. at 34.

likely be foreclosed from adding them without dropping a more popular service.

With respect to the other issues raised concerning the calculation of the channel occupancy limits, NCTA submits that pay-per-channel and pay-per-program services, which typically are received by only a small percentage of a system's subscribers, should not be counted, or should only be counted on a pro rata basis. Similarly, multiplexed services should not be counted. Finally, any channel occupancy limits adopted by the Commission should apply only to nationally distributed program networks. As discussed above with respect to the subscriber limits provision, there is no indication in either the statutory language or the legislative history that Congress intended to reach regional programmers and their inclusion would have the effect of deterring cable operator investment in programming of more local interest.

4. To Whom Should The Channel Occupancy Limits Apply

Indicative of the uncertainty surrounding the channel occupancy provision is the fact that there is some debate as to whom the channel occupancy limits apply. In particular, the Commission seeks comment on its tentative conclusion that the channel occupancy limits apply only to an operator's carriage of video programmers in which that particular operator has an interest, not to the operator's carriage of any vertically integrated program network.[62]

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[62]NPRM at ¶49-50.

NCTA agrees with the Commission that the channel occupancy provision should not apply to the carriage of all program networks that happen to be vertically integrated. Cable operators who have no ownership interest in a particular programmer have no reason to favor that programmer nor do they have any influence over the content of the service. Thus, a narrower application of the provision is more consistent with the statutory objectives of preventing anticompetitive behavior and promoting diversity. Moreover, as indicated earlier in other contexts, the mere fact that the legislative history contains an example of a channel occupancy calculation in which the limits appear to be applied broadly to all vertically integrated programmers does not bind the Commission to such an approach. Both the language of the statute itself and other statements in the legislative history comport more closely with a narrower reading of the channel occupancy provision.[63]

5. The Effect Of Emerging Technologies

The Commission asks whether the channel occupancy limits should take into consideration emerging technologies such as

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[63]There is yet another interpretation of the channel occupancy provision that the Commission may wish to consider. Limits could be imposed on a programmer-by-programmer basis. Thus, a cable operator with interests in different programmers would be subject to separate limits for each programmer. This approach is consistent with both the statutory language and the legislative history. Moreover, it reflects the fact that different programmers, with different ownership structures, do not all express the same viewpoint simply because a particular cable operator has an interest in each one.

digital signal compression and fiber optic cable.[64] In particular, the Commission seeks comment on its proposal to establish a threshold beyond which the channel occupancy limits would no longer apply.[65]

NCTA supports the concept of "capping" the channel occupancy limits at a certain channel capacity level. We suggest that 36 channels would be an appropriate threshold.

First, there is statutory precedent for using 36 channels as a trigger for imposing obligations that relate to the carriage of programming from unaffiliated sources. In particular, a system's leased access obligations are triggered at 36 channels as are a system's unrestricted non-commercial must-carry obligations.[66] Second, setting the threshold at a relatively low level will provide additional incentives for smaller systems to invest in new technologies and programming.[67] Third, given that the channel occupancy limits should serve as a market structure safeguard rather than as a primary remedy for particular actions,

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[64]NPRM at ¶53.

[65]Id.

[66]See 47 U.S.C. §532(b)(1)(A) (leased access); 47 U.S.C. § 535(c) (non-commercial must-carry). See also 47 U.S.C. §532(g) (authorizing the Commission to promulgate additional rules to provide diversity when cable systems with 36 or more activated channels are available to 70% of all households and such systems are subscribed to by 70% of the households to which they are available).

[67]As indicated above, setting the channel occupancy threshold at 36 channels also is a way of defusing the threat that such limits will deter the introduction of a la carte and multiplexed services.

it is appropriate to cap the limits at a relatively low threshold.

6. Application Of Limits Where Effective Completion Exists.

The Commission raises the issue of whether channel occupancy limits should be phased out in those communities where effective competition exists.[68] The Commission also asks whether the limits should be lifted for cable systems that meet any of the effective competition criteria or only for those systems that meet certain of the criteria.[69]

NCTA submits that it is appropriate to phase out the channel occupancy limits for all systems that are subject to effective competition. Congress' concern in requiring the adoption of channel occupancy limits was that the flow of programming to consumers and to other distributors might otherwise be restrained. Where a system is subject to effective competition, however, there is no reason for such concern. The availability of a competing distributor offers unaffiliated programmers with a means of obtaining access to the viewing public. Nor should the phase out provision be limited to those instances where effective competition exists because of the presence of competing distributors. Where a system is deemed subject to "effective competition" due to low penetration, the system's ability to exercise market power and to have an impact on diversity are

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[68]NPRM at ¶54.

[69]Id.

likely to be so greatly diminished as to render the application of channel occupancy limits unnecessary.

7. Enforcement

As was the case with the subscriber limits provision, the Act and the legislative history do not provide a specific mechanism for enforcing the channel occupancy limits. In the face of this silence, the Commission has proposed that local franchise authorities be given primary responsibility for enforcing the limits and that such enforcement be accomplished by means of a certification approach.[70] NCTA submits that the Commission's proposal is a singularly bad idea.

Although the Commission's stated purpose in proposing a locally enforced certification approach is to minimize the burden on cable operators and franchise authorities, such an approach actually will have the opposite effect. While most franchise authorities may well be familiar with the number of channels offered on a system and the name of the various services carried, the vast majority of franchise authorities probably have no knowledge of, or the resources and expertise to determine, the ownership structure of the various programmers being offered. Moreover, authorizing franchising authorities to request "additional information" to determine a system's compliance with the channel occupancy limits is an initiation for fishing expeditions.

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[70]NPRM at ¶55.

A far better, and ultimately less burdensome approach, is for the Commission to enforce the channel occupancy limits on a complaint basis. Standing to bring such complaints should be limited to unaffiliated program networks that are not being carried by the system. The presence of unused leased access capacity should be an affirmative defense and, in the event an operator is found to have exceeded the limits, the operator should have the flexibility to remedy the noncompliance by any means, including divestiture of a service, adding other services, or replacing services. The Commission also should consider waiver requests. We believe the number of complaints under such an approach and the burden on operators and the Commission would be relatively small and that where a complaint was filed, operators would be assured consistency in the interpretation of the rules.[71]

D. Section 613(f)(1)(C): Limits On Participation In Program Production

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[71]The Commission proposes to grandfather any existing vertical relationships that exceed the channel occupancy limits it ultimately adopts. NPRM at ¶55. NCTA believes that because it would be inappropriate for the Commission to set channel occupancy limits so low as to constrict, or even freeze, current levels of vertical integration, the need for grandfathering should not, as a practical matter, even arise. In any case, however, we agree that the Commission should not, in implementing the channel occupancy limits, force the deletion or divestiture of services. See Cable Television Report and Order, 36 F.C.C.2d 141, 185 (1972) (grandfathering existing carriage of broadcast signals not consistent with newly-adopted carriage limitations); id. at 173 (in applying carriage rules, "emergence of new stations will not require displacement of existing signals because that would cause disruption of service to the public").

Section 613(f)(1)(C) of the 1992 Cable Act directs the Commission "to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video distributors may engage in the creation or production of video programming."[72] The Commission proposes that, in light of the various other provisions in the 1992 Act addressing issues of concentration and control, no additional restrictions are warranted at this time.[73]

NCTA agrees that the Commission need not and should not impose any restrictions on the creation or production of programming under this section. Unlike Section 613(f)(1)(A) and Section 613(f)(1)(B), Section 613(f)(1)(C) does not mandate the adoption of any restrictions.[74] Moreover, as the Commission recognizes, Section 613(f)(1)(C) addresses the same concerns regarding vertical and horizontal concentration as subscriber limits and channel occupancy provisions. These concerns also are dealt with in the program access, regulation of carriage agreements, and leased access provisions of the 1992 Act. Under the circumstances, adoption of additional restrictions under this provision would be redundant and unduly burdensome. Indeed,

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[72]47 U.S.C. §533(f)(1)(C).

[73]NPRM at ¶60.

[74]While it is clear from the Senate Report that Congress intended for the Commission to adopt some level of subscriber limits and channel occupancy limits, the participation in program production provision originated in the House. See Conference Report at 81-82. The House Report (and the language of the House bill) clearly indicates that the Commission is free not to adopt limits on program production. See House Report at 43, 123.

imposing further limitations on a cable operator's participation in the production or creation of production would contravene congressional intent by stifling diversity and restricting the flow of programming to the public.

II. SECTION 617: SALES OF CABLE SYSTEMS

In Section 617 of the 1992 Cable Act, 47 U.S.C. §537, Congress established a three-year holding requirement for cable systems. As described in the NPRM, this anti-trafficking rule prohibits the sale or transfer of ownership in a cable system within three years following the acquisition or initial construction of the system.[75] The provision carves out three exceptions to the restriction: any tax-free transfer; any sale required by operation of law or by a governmental entity; and any sale or transfer to a commonly-controlled entity.

The legislative history provides little guidance on Congress' motivation for enacting a cable anti-trafficking rule. The House Report merely states that Congress intended to prohibit "profiteering transactions" which may adversely affect cable rates or service in the franchise community.[76] While profiteering is not defined, federal anti-trafficking rules historically have been aimed at stemming speculation or trade in

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[75]NPRM at ¶7.

[76]House Report at 119. Congress was also concerned that the rule not impede lenders from obtaining a security interest in connection with providing financing for cable system acquisitions. Id. at 120.

licenses to the detriment of the public interest.[77] Thus, in the cable context Congress presumably was seeking to prevent individuals from purchasing cable systems with the intent to resell the system for a quick profit rather than to provide cable service to the community. Such exploitative activity, it was feared, could drive up the cost of cable systems and ultimately have a detrimental affect on rates and service to the public.

While the early 1990's have been marked by relative stability in cable system sales and transfers,[78] Congress apparently believed that some check on system transactions was necessary. This check should not be construed, however, in a manner that would impede the influx of new capital investment in the cable industry or the ability of existing investors to bring about beneficial economies of scale and other efficiencies through the sale or transfer of systems. In other words, the Commission's three-year holding rule should not inhibit legitimate transactions but should protect against isolated instances of profiteering.

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[77]See, e.g., In the Matter of Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), Report and Order, 52 RR 2d 1081, (December 2, 1982); In the Matter of Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfer of Control), Memorandum Opinion and Order, 4 FCC Rcd 1710 (February 10, 1989). In 1982, the Commission eliminated the three-year holding rule for broadcast licenses on the grounds that, in the present competitive market, the public interest would be better served by permitting market forces to govern station sales transactions, rather than artificial limitations that might actually cause deterioration of service.

[78]Paul Kagan Associates, Inc., "Cable TV Finance," December 23, 1992, p.7.

Therefore, as we discuss below, the Commission should apply the anti-trafficking restriction to transactions that involve a substantial change in ownership, should adopt a definitive date for calculation of the three-year period, and should give full effect to the statutory exceptions. The Commission also should have the responsibility for monitoring and enforcing the anti-trafficking rule to ensure that it is applied in a uniform and consistent manner.

A. "Transfer Of Ownership" Should Be Defined As Transfers Involving A Substantial Change In Ownership

In the NPRM, the Commission seeks comment on what constitutes a "transfer of ownership in a cable system" for purposes of the anti-trafficking rule.[79] It tentatively concludes that the broadcast transfer of control standards are appropriate, suggesting that the broadcast attribution criteria be used to define ownership interests subject to the cable three year holding requirement.[80]

NCTA submits that the body of law in the area of broadcast transfer of control is useful precedent for interpretation of the cable anti-trafficking rule. In particular, the "substantial change in ownership" test developed by the Commission pursuant to Sections 309(c)(2)(B) and 310(d) of the Communications Act of 1934 should be applied to cable system sales or transfers. Section 309(c)(2)(B) exempts applications for assignment or

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[79]NPRM at ¶9.

[80]Id. at ¶12.

transfer of licenses that do not involve a substantial change in ownership or control from public notice and petition to deny procedures.[81] Such transfers are eligible to file pro forma or short-form applications.[82]

The Commission's rules provide specific examples of broadcast transactions that do not present substantial changes in ownership or control, including assignment of license from an individual to a corporation controlled by that individual, and assignment or transfer of control from a parent to a subsidiary corporation.[83] Similarly, the cable anti-trafficking provision exempts transfers between affiliated entities. This exemption provides a clear indication that Congress did not intend to include pro forma transactions, that is, transfers that do not involve substantial changes in ownership, under the anti-trafficking restriction.

Beyond common ownership situations, the Commission has found in the broadcast area that pro forma procedures apply where less than 50 percent of the stock changed hands, and more than 50

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[81]47 U.S.C. §309(c)(2)(B). Section 310(d) relates to assignments and transfers of construction permits and station licenses under foreign ownership restrictions. 47 U.S.C. §310(d).

[82]See generally S. Sewell, Assignments and Transfer of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934, 43 Fed. Com. L.J. 277 (1991) (hereinafter "S. Sewell").

[83]47 CFR §73.3540(f). Although the rule provides specific examples, it is not intended to be exhaustive. S. Sewell, supra at 318, citing Storer Communications, Inc., 57 RR 2d 1651, aff'd, 763 F.2d 436, 440-41 (D.C. Cir. 1985).

percent of the stock remained in the hands of FCC-approved owners.[84] A transfer of ownership test based on 50 percent or more ownership interest is particularly appropriate in the cable anti-trafficking arena since the rule is designed to preclude profiteering, an activity which is only likely to be exercised by an equity stakeholder with a majority interest in the system.

In applying the general precedents for "substantial change in ownership," including the 50 percent or greater ownership threshold, the Commission should look to whether the transferee's interest enables it to control management and operation of the system and to make policy decisions. In any event, the fixed attribution criteria contained in Section 73.3555 of the Commission's rules are an insufficient threshold for cable anti-trafficking purposes.

Under Section 73.3555, voting stock interest of 5 percent or more is generally considered an attributable interest. As the Commission points out in the Notice, Congress did not intend the anti-trafficking rule to restrict transfers of such noncontrolling interests since they are unlikely to occur for purposes of profiteering.[85] Indeed, applying the attributable interest standard to cable transfers would likely inhibit the availability of investment capital by sweeping in all minority investors.

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[84]Barnes Enterprises, Inc., 55 FCC 2d 721 (1975). See also Metromedia, Inc., 98 FCC 2d 299 (1984).

[85]NPRM at ¶12.

In light of the foregoing, the Commission should include under the anti-trafficking rule only those transactions that involve a substantial change in ownership and control.

B. Calculation Of The Tree-Year Holding Requirement Should Commence On A Definitive Date And Should Not Be Applied On A System-By-System Basis For MSO Transfers

1. Initial Construction And Acquisition

The Commission seeks comment on how to calculate the three-year holding period.[86] For initial cable system construction, it suggests the period could commence on the date of activation of a constructed system or upon award of the franchise.[87] For acquisition or transfer of existing systems, the Commission proposes the date of the transfer or assignment agreement or the date an application for transfer or assignment is filed with the local franchise authority.[88]

With regard to "initial construction," NCTA recommends that the three-year period begin to run when service is activated to the first customer in the franchise community. It appears to be more appropriate to interpret the term "initial construction" as referring to the construction of the headend and related facilities necessary to deliver service to the first subscriber rather than simply the award of the franchise. Moreover, the operator would not be faced with the uncertainty of whether fulfilling construction requirements in the franchise agreement

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[86] Id. at ¶14.

[87] Id.

[88] Id.

or providing subsequent extensions of service to adjacent areas would still fall under "initial construction."[89] The operator would have a definitive date on which to determine the status of future transactions.

For acquisition or transfer of already-constructed systems, a readily discernible date for calculating the anti-trafficking period is the date of the closing of the transaction transferring control of the system.

2. Multiple System Operator Transfers

The Commission has appropriately recognized that special procedures may be necessary for determining compliance with the anti-trafficking provision for transfers of multiple system operators (MSOs). Noting that the restriction was not "meant to forestall MSO transfers," the Commission seeks clarification on whether the time period must be satisfied for each system owned by the MSO.[90]

In NCTA's view, the policy behind the anti-trafficking rule will not be served by a rigid, overly-inclusive interpretation of the three-year holding requirement for MSO transfers. Instead, such a reading would actually have the unintended effect of thwarting legitimate business transactions and promoting inefficiencies. Rather than addressing profiteering, a system-

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[89]Where a single integrated cable system which serves multiple franchise areas is transferred, the holding period should be calculated from the date of initial construction or acquisition of the first franchise in the system.

[90]NPRM at ¶14.

by-system approach could frustrate a multiple system operator's ability to effectuate economies of scale through system acquisition or could force premature divestitures.

Therefore, the Commission should adopt a rule which looks to whether or not the majority of the subscribers in the systems to be transferred are served by systems that have been held by the MSO for at least three years. This is the most equitable approach and will ensure that MSO transfers are not exploited for short-term profit.

In addition, as Congress recognized in Section 617(b) of the Act, the subsequent transfer of systems is a common practice in MSO acquisitions. Section 617(b) provides that in the case of a sale of multiple systems, "if the terms of the sale require the buyer to subsequently transfer ownership of one or more such systems to one or more third parties, such transfers shall be considered a part of the initial transaction." The Commission should make clear that such transactions do not subject the transferee to a separate three-year holding period for those systems that are to be subsequently transferred.

The rules should also provide that "spin-off" practices do not violate the anti-trafficking rule even if the particular system(s) is not identified in the transaction, provided the spin-off occurs within a date certain of the acquisition. The three-year holding period for the individual or entity that acquires the system in the spin-off should relate back to the date on which the original transferee acquired the system.

C. The Commission Should Adopt Rules That Fully Realize The Scope Of The Exceptions To The Anti-Trafficking Rule

1. Tax-Free Transfers

Under the Act, any transfer of ownership interest in any cable system which is not subject to Federal income tax liability is exempt from the three-year holding requirement. The Commission correctly points out three examples of such transactions: (1) transactions involving tax certificates issued by the Commission pursuant to Section 1071 of the I.R.S. Code, which allow deferral of capital gains taxes for minority acquisitions; (2) transactions deemed "tax free" exchanges of assets pursuant to Section 1031 of the I.R.S. Code; and (3) transactions deemed "tax free" reorganizations pursuant to Section 368 of the I.R.S. Code.[91]

While these types of tax-free or deferred income transactions are perhaps the most common, this is not an exhaustive list. Other types of transactions may qualify, including tax free contributions to capital under Section 351 of the I.R.S. Code. With regard to the Commission's particular concern about the eligibility of tax free swaps (i.e., the payment of cash or other taxable consideration to equalize the value of assets in like system exchanges), we maintain that there is no basis for disqualifying such transactions under Section 368 of the I.R.S. Code for anti-trafficking purposes.

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[91] Id. at ¶15.